

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
REPLY BRIEF**



75-1219 <sup>B</sup><sub>PA</sub> S

To be argued by  
RICHARD G. CHOSID

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

JOHN P. BOMMARITO,

Appellant.

Docket No. 75-1219

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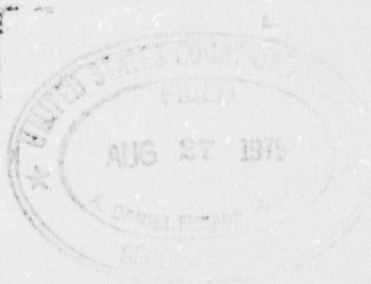
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REPLY BRIEF FOR APPELLANT  
JOHN P. BOMMARITO

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ON APPEAL FROM A JUDGMENT  
OF THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK



  
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### SUPPLEMENTARY STATEMENT OF FACTS

In its Brief presented to this Court, the Government included a statement of the "Government's Case." While the Statement of Facts in an Appeal Brief is supposed to be neutral, it is well accepted practice that both sides of any litigation will try to shade the facts to be neutral in their favor. It has been the practice of Mr. Bommarito's counsel not to take issue with statements of facts that are so shaded.

In this case, however, where the facts are crucial to a proper determination of the legal issues presented on this Appeal, counsel feels compelled to bring to the Court's attention gross misappropriateness of Trial testimony by the Government in its Brief.

On Page 2. of the Government's Brief, it is stated that Ciraco "flew to Miami, Florida, with the purpose of finding drugs, and in particular Methamphetamine, to purchase and resell in the New York area." Appellant will not take issue with the fact that the Government alleges that Mr. Ciraco went to Florida looking particularly for speed, even though Mr. Ciraco stated at least twice that he was looking for any drug. (Transcript, Pages 24, 89.) However, the Government's allegation that Mr. Ciraco intended to resell in the New York area is not supportable. In fact, Mr. Ciraco stated he intended to sell any narcotic he could buy, anywhere he could sell it. (Transcript, Pages 24, 89, 246, 247).

The Government is also in error when it claims that Mr. Wolf, in response to Mr. Ciraco's request for a drug connection, "replied that he knew the defendant, Bommarito." The testimony is clear that Mr. Ciraco did not know who his connection was until several weeks later.

On Page 3. of its Brief, the Government states that, if Ciraco's sales of speed in New York were successful, there was an "understanding" that he "would return and purchase further pounds of methamphetamine." There is no evidence in the quoted pages of the Transcript, or anywhere else in the Transcript, that even tends to support that allegation. There is not one sentence of testimony that indicates that Mr. Ciraco was to return to buy more narcotics if the first sale was "successful," as the Government phrases it.

Finally, on Page 5., the Government states that in a phone call that was placed by Mr. Ciraco to Mr. Bommarito, the two "agreed to keep in touch about further drug deals." The Government's direct examination of Mr. Ciraco directly refutes that statement. Mr. Ciraco testified that he called Mr. Bommarito just to explain why he had not called him in such a long time. There was an agreement to have Ciraco give Mr. Bommarito a call when Ciraco got his own telephone number. It was never shown at Trial that this conversation concerned future drug deals.

## ARGUMENT

### I.

#### WHARTON'S RULE REQUIRES THE REVERSAL OF THE CONSPIRACY CONVICTION OF MR. BOMMARITO.

In Mr. Bommarito's main Brief, he contended that, under Wharton's Rule, Mr. Bommarito's conviction for conspiracy to violate Federal Narcotics Laws cannot stand.

In response to this argument, the Government has contended that narcotics cases are not of the type that fit within that Rule. The Government argues, at Page 8. of its Brief, that narcotics cases fall without Wharton's Rule because "drug offenses necessarily involve 'immediate consequences' for society as a whole rather than for the participants themselves..." This argument is easily rebuttable on three grounds.

First, the United States Supreme Court has already extended Wharton's Rule to cases involving contraband. United States v. Katz, 271 U.S. 354 (1926).

Secondly, the Government seems to imply that only physical consequences can be "immediate consequences." In other words, the Government says that, because the sale of narcotics eventually affects a third person in a physical manner, it is different from the crimes that are generally considered to be within Wharton's Rule.

The harmful effects on society of adultery or bigamy are nonetheless socially significant, even though the affects

are not immediately manifested biologically. The reason why such acts are outlawed is that they lead to and cause moral corruption and emotional stress in innocent third persons. While the "immediate consequences" of a narcotics violation are more easily cognizable, the effects of moral corruption are certainly as destructive. In fact, while many individuals are able to rid themselves of the need and effects of drugs, the indelible effect of moral corruption nearly always remains and pervades others, perhaps more rapidly than any other disease.

Thirdly, the immediate consequences of any narcotics activity generally reaches only those who have voluntarily chosen to use narcotics. This is in contradistinction to those who suffer the consequences of the moral crimes considered to be the classic Wharton cases. The people who are hurt most by moral crimes are those who have not chosen to be involved at all.

Therefore, it is Appellant's contention that to say that narcotics cases do not fit within the Wharton Rule because there are no immediate consequences is not supportable in reason.

The Government further asserts that Ianelli v. United States, 43 U.S.L.W. 4423 (1975) offers additional support to the argument that Wharton's Rule is inapplicable to the present case. The Government's position is that in Ianelli, the Supreme Court found Wharton's Rule inapplicable because the Organized Crime Control Act of 1970 evidenced clear legislative intent to treat conspiracy to gamble and substantive offenses distinctly.

In Ianelli, the Supreme Court stated that Wharton's Rule applies to offenses requiring concerted criminal activity, absent a legislative intent to the contrary. Since a contrary intention was clear regarding the Organized Crime Control Act of 1970, Wharton's Rule did not apply to this §1955 action.

The Government then contends that this same legislative intent to treat conspiracy to gamble and substantive offenses of gambling separately, is as strong in the legislative history which surrounds the establishing of the federal narcotic legislation under Title 21 of the United States Code. However, a full review of the legislative history regarding the federal narcotic laws does not reveal any legislative intention to treat conspiracy to violate federal narcotics laws and substantive violations in any particular distinctive manner. In fact, a reading of the legislative history in 1970 U. S. Code Cong. & Admin. News at 4566, et seq., does not reveal any special discussion of conspiracy narcotic violations versus substantive offenses of narcotics violations. Thus, unlike Ianelli, where the Court found a legislative intent that Wharton's Rule should not apply to that prosecution under §1955, no such legislative intent applies to the present prosecution and thus, Wharton's Rule is fully applicable in this cause.

The Government next proceeds to state that, while concededly, distribution of narcotics involved the concerted activity of two persons and thus might fall under Wharton's Rule, Mr. Bommarito was also charged with conspiracy to poss-

ess with intent to distribute, and possession does not involve concerted activity. Therefore, the Government contends, Wharton's Rule certainly does not bar the conspiracy to possess narcotics with the intent to distribute. The problem with this argument is that the evidence presented at Trial did not reveal any partnership in the possession of narcotics between Mr. Ciraco and Mr. Bommarito. As has been fully set forth in Defendant's main Brief, once Mr. Bommarito transferred control of the Methamphetamine to Mr. Ciraco, Mr. Bommarito had no interest in what happened to the narcotics. Therefore, there is no evidence which supports the Government's claim that Mr. Bommarito shared in the possession of narcotics by Mr. Ciraco and thus, we do not reach the problem of whether Wharton's Rule applies to conspiracies to possess narcotics with intent to distribute.

Finally, the Government states that Wharton's Rule is inapplicable in the present case since persons "to the Grand Jury known and unknown" joined with Ciraco and Bommarito in the conspiracy. The Government specifically mentions two individuals, one who delivered the pound to Mr. Ciraco in the hotel in Detroit, and the other who delivered a package to Mr. Bommarito in Florida.

As to the two mentioned individuals, there was no showing that they had the requisite mental state to be considered conspirators. For all that was shown, these individuals could have been hired messenger boys, paid only to deliver a package. As to any other persons "to the Grand Jury known and unknown,"

the Court can not just infer these persons were involved in narcotics activity with Mr. Bommarito. In United States v. Chase, 372 F. 2d. 453 (2nd. Cir., 1967), this Court stated that no inferences can be drawn from the existence of divers other persons, either known or unknown, that activities occurred between the Defendant and those persons. When that principle is applied to the case at bar, it is seen that no more individuals than the amount required to violate the law were involved in this case.

## II.

### THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONSPIRACY CONVICTION.

The second argument of Appellant's main Brief is directed at showing that, under the law as construed in this Circuit, the facts in this case do not support a conspiracy conviction.

Appellant argued in his main Brief that, even if a conspiracy ever existed, it must have ended March 8, 1974. This is so because there was no one with whom Mr. Bommarito could have conspired after that date. The co-defendant in the Trial, Herbert Wolf, was acquitted of conspiracy and aiding and abetting charges. The government agents cannot be conspirators because they do not have the necessary mental state.

The Government has responded that there "was adequate evidence tending to show that Bommarito was still conspiring with others than Ciraco during the Detroit phase of the transactions..." The Government then fails to adequately cite to any evidence supporting that statement. In fact, no evidence even exists tending to show Mr. Bommarito engaged in narcotics activity with anyone other than a government agent after March 9, 1974. The Government alludes to the existence of unknown others with whom Mr. Bommarito conspired. However, there is no proof that any of these individuals had the requisite mental state to be considered a conspirator. In addition, United States v. Chase, 372 F. 2d. 453 (2nd. Cir., 1967) would indicate that this Court

cannot infer that, because Mr. Bommarito engaged in narcotics activity before March 9, 1974, that Mr. Bommarito continued uninterruptedly as a conspirator in a narcotics operation after the arrest of the only other known conspirator.

Appellant argued further in his main Brief that, looking only at the events prior to March 8, 1974, there was insufficient evidence to support a conspiracy conviction. The Government has responded that there is ample evidence to support Mr. Bommarito's conviction. In making that statement, the Government relies upon its own conclusion that there was a "clear intent to deal further in drugs following the successful completion of the first installment." (Page 13. of the Government's Brief.)

The Government has based that conclusion on erroneously interpreted meanings of certain actions by the parties. If there was such a clear intent for future purchases, why was there never even a conversation concerning a second purchase until Agent Senneca approached Mr. Bommarito? The Government makes much of the telephone calls between Mr. Bommarito and Ciraco prior to March 8, 1974. Yet, only the fact that Ciraco still owed Mr. Bommarito money and how soon it would be paid was discussed.

The Government also states at Page 14. of its Brief, that "the evidence makes perfectly clear, the explicit terms of the agreement was that Ciraco would take the drugs to New York and send Bommarito a stated share of the proceeds of his resale of them there." The Government is clearly erroneous in that

conclusion. In the first place, Mr. Ciraco stated expressly at Trial that he intended to sell the drugs wherever he could and that there was no agreement at all between him and Mr. Bommarito as to where the drugs were to be sold. (Transcript, Pages 246, 247.) Secondly, the evidence is conclusive that Mr. Bommarito did not have a share in the proceeds. Mr. Ciraco owed Mr. Bommarito the money, regardless of whether Mr. Ciraco sold the drugs or not. Mr. Bommarito had no interest in Mr. Ciraco's business, other than as to when Mr. Ciraco paid him. There was no contingent payment arrangement at all. In fact, the sale was to be on a cash basis, but, because Ciraco lacked the resources, it was sold to him on a credit basis.

The Government cites U.S. v. Campisi, 306 F. 2d. 308 (2nd. Cir.), cert. denied, 371 U.S. 920 (1962) in support of its argument that ample evidence exists to convict Mr. Bommarito of conspiracy. That case is inapposite to this case, however, because the facts of the two cases are clearly different. In Campisi there were three tiers of actors: The A group stole the bonds, the B group bought them and the C group passed them. The A group, however, would not get paid by the B group until the C group successfully passed the bonds. Thus, the A group had a stake in the ventures of the C group. In Mr. Bommarito's case, he had no stake in Ciraco's ventures. Mr. Ciraco owed the money for the drugs whether or not he successfully sold them.

The Government next asserts this case is controlled by the principles discussed in Alexander v. United States,

241 F. 2d. 351 (8th. Cir.), Cert. denied, 354 U.S. 940 (1957). In Alexander, the Court found Mr. Alexander guilty of conspiracy to possess and distribute heroin in Missouri, even though he never left Chicago. The Government, relying on Alexander, thus asserts that Mr. Bommarito was guilty of conspiracy to possess and distribute Methamphetamine in New York, even though Mr. Bommarito never left Florida. The Government claims the present case is controlled by Alexander because the facts are remarkably similar. However, that is not the case.

In Alexander, the facts revealed that the prospective buyer of heroin met with Robinson, a co-conspirator of Alexander's, to discuss the purchase of heroin. At this meeting, Robinson phoned Alexander, who then came to the site of this meeting and had a discussion with Robinson. Furthermore, during another meeting between Robinson and the buyer relative to the further purchase of heroin, Robinson told the purchaser to contact Alexander to complete arrangements for the delivery of the heroin. Based upon this evidence, the Court found ample evidence to conclude Alexander was involved in those acts occurring in Missouri, even though he himself, never left Chicago.

The present case reveals a completely different situation. Mr. Bommarito never met with, nor discussed any matters with any of those persons who were to buy narcotics from Mr. Ciraco. Furthermore, Mr. Bommarito was never involved in making any arrangements for the transfer of narcotics from Mr. Ciraco to any buyers. Thus, unlike Alexander, the present case does not con-

tain facts which show that Mr. Bommarito knew of or participated in the transfer of narcotics from his purchaser to another purchaser. In addition, whereas in Alexander the facts reveal a clear showing of arrangements being made between two partners and their purchaser for the sale of drugs, the present case only reveals Mr. Bommarito's knowledge of the transfer of drugs from himself to Mr. Ciraco.

Due to the differing facts of this case, it is clear the holdings of Alexander and Campisi do not apply to the present case and thus there is insufficient evidence to support Mr. Bommarito's conspiracy conviction.

### III.

#### BOMMARITO'S PRIOR CONSPIRACY CONVICTION BARS THIS PRESENT CONSPIRACY CONVICTION.

The Government responds to Mr. Bommarito's double jeopardy claim by claiming that Mr. Bommarito did not introduce any evidence which would show that his prior conspiracy conviction in Oklahoma barred the conspiracy in this matter. Mr. Bommarito contends that he has introduced facts which do show one large, on-going conspiracy, rather than the two independent conspiracies. Further, at the Trial in this matter, Mr. Bommarito did attempt to have the opportunity to present witnesses who could testify as to the overall connection between the Oklahoma activities and the New York activities. Although Mr. Bommarito requested the opportunity to delay the presentation of the defense in order to present agents from Detroit relative to this issue, the Trial Court rejected this request. Therefore, for the Government to now claim that Mr. Bommarito did not present evidence relative to his double jeopardy claim is unfair, since this attempt was precluded by the decision of the Court.

Additionally, the Government cites United States v. Barzie, 433 F. 2d. 984 (2nd. Cir., 1970), Cert. denied, 401 U.S. 975 (1971), as one case which would rebut Mr. Bommarito's double jeopardy claim. However, Mr. Bommarito contends that

the present case fully falls within the purview of U.S. v. Mallah, 503 F. 2d. 971 (2nd. Cir., 1974), rather than Barzie. Even if Barzie deserves consideration by this Court, there is one significant difference between Barzie and the present case. In Barzie, the Court rejected defendant's double jeopardy claim but noted that the defendant had been given every opportunity to submit proof on the question of double jeopardy and had still failed to submit such proof. In the present case, Mr. Bommarito was not given every opportunity to submit proof on the question of double jeopardy, but rather was foreclosed from the presentation of such evidence.

Thus, whereas in Barzie, the defendant's failure to present evidence was some indication of the lack of a meritorious claim on double jeopardy, this conclusion cannot be reached in the present case, and Mr. Bommarito's claim is entitled to full consideration by this Court.

IV.

FAILURE TO GIVE MR. BOMMARITO PROPER NOTICE OF THE CHARGE OF AIDING AND ABETTING IN THE INDICTMENT IS A DENIAL OF DUE PROCESS IN THIS CASE.

The Government has responded to Appellant's argument under this point by stating that the precise claim made by Appellant has already been decided adversely to Appellant. A review of the cases cited by the Government shows that the claim, as presented by this Appellant, has not already been decided.

The essence of Appellant's claim is that the failure to give notice of the charge of aiding and abetting constituted a denial of due process in this case. While 18 U.S.C. 2 permits charging an aider and abetter as a principal, that statute must be interpreted in each case to comport with previously determined requirements of Due Process. The effect of 18 U.S.C. 2 cannot operate to correct what has otherwise been held to be a denial of due process.

The Indictment issued against Mr. Bommarito contained substantially the language of the statute as allegedly violated. In his main Brief, Appellant listed five (5) deficiencies in that Indictment that caused prejudice to the preparation of his defense. This Court has previously determined that a recitation of substantially the language of a statute in the charge of an indictment will be sufficient only if its generality neither

prejudices the defendant in the preparation of his defense nor endangers his constitutional guarantee against double jeopardy. United States v. Palmiotti, 254 F. 2d. 491 (2nd. Cir., 1958). In this case, the generality of the Indictment did cause actual prejudice.

Therefore, the failure of the Government to give proper notice of the charge of aiding and abetting and the mere recitation of substantially the language of the statute allegedly violated was a denial of due process under U.S. v. Palmiotti. It is Appellant's contention that 18 U.S.C. 2 cannot operate to correct the constitutional deficiencies of the Indictment in this case.



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-vs-

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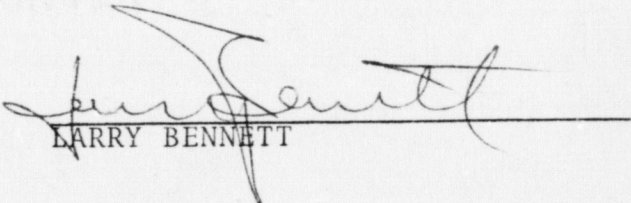
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Docket No. 75-1219.

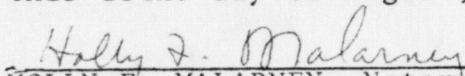
AFFIDAVIT OF SERVICE

STATE OF MICHIGAN )  
                              ) SS.  
COUNTY OF OAKLAND )

LARRY BENNETT, being first duly sworn, deposes and says that on the 25th. day of August, 1975, he did serve upon the United States Attorney for the Southern District of New York, true copies of Reply Brief for Appellant, John P. Bommarito, by placing same in the United States Mail with the proper postage affixed thereto.

  
LARRY BENNETT

Subscribed and sworn to before me  
this 25th. day of August, 1975.

  
HOLLY F. MALARNEY, Notary Public  
Oakland County, Michigan  
My Commission expires: 9-5-76.